Supreme Court, U.S.
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No. _____

IN THE SUPEME COURT OF THE UNITED STATES
October Term, 1995

CLARA M. HESS,
Petitioner,

v.

STEVEN MacASKILL, DIRECTOR,
Women's Correctional Center,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the right against self-incrimination was violated in this case.

2. Whether there was a failure to give Clara Hess advice of rights upon a court-ordered psychological and psychiatric evaluation and right to counsel.

3. Whether the Court erroneously failed to consider the application of State law.

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Clara M. Hess respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit.

REPORT OF OPINIONS BELOW

Clara M. Hess v. Steven MacAskill, Director, Women's Correctional Center, No. 94-35445, an unpublished decision of the Ninth Circuit Court of Appeals, dated September 20, 1995. Petition for Rehearing denied October 19, 1995.

Clara M. Hess v. Steven MacAskill, Director, Women's Correctional Center, No. CV 93-133-BLG-RWA, Memorandum and Order of the United States District Court for the District of Montana, Billings Division, dated March 4, 1994.

Clara M. Hess v. Steven MacAskill, Director, Women's Correctional Center, No. CV 93-133-BLG-RWA, Memorandum and Order (request for new trial denied) of the United States District Court for the District of Montana, Billings Division, dated April 14, 1994.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 20, 1995. The Petition for Rehearing was denied on October 19, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution:

Fifth Amendment: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law."

Sixth Amendment: "In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

The defendant, Clara M. Hess, was charged by Information filed in the District Court of the State of Montana on October 23, 1989, with the crime of deliberate homicide. The defendant appeared on October 24, 1989, and entered a plea of "Not Guilty". She is alleged to have killer her husband at their home north of Livingston, Montana.

During the course of the proceedings, the State moved for a psychiatric and psychological examination of Clara M. Hess. This motion was made on January 17, 1990. The Court granted such motion by order date March 27, 1990, requiring such examination, and upon refusal to do so, imposing a sanction that Clara Hess could not produce the expert on Battered Woman Syndrome, Dr. Lenore Walker of Denver, Colorado, upon her refusal to submit to such examination. Under protest, and the Court's order imposing sanctions, the defendant submitted to such examination, and the State's experts testified at the time of trial against her.

This case came on for trial on August 20, 1990, and on August 30, 1990, the jury returned a verdict of "Guilty" of mitigated deliberate homicide, a felony. Clara Hess was sentenced on September 26, 1990, to a term of thirty years, plus an enhanced term of five years for use of a weapon, to be served consecutively.

On March 10, 1992, the Supreme Court of the State of Montana issued its opinion affirming the decision of the trial court. Petition for rehearing was filed in a timely fashion and denied by the order of the Court dated March 31, 1992.

On August 10, 1993, petitioner, having exhausted her remedies in State Court, filed a Petition for Writ of Habeas Corpus. During the course of those proceedings, the State of Montana conceded that petitioner had exhausted her remedies in State Court. Respective motions for summary judgment were filed by the parties, and on March 4, 1994, the Federal District Court granted the State's motion for summary judgment. A timely motion for new trial and motion to alter or amend the judgment as a matter of law was filed on March 14, 1994. The Court, by its order dated April 14, 1994, denied post judgment relief. A notice of appeal was timely filed to the Ninth Circuit Court of Appeals on May 2, 1994.

With respect to the issues presented in this Court, the following dialogue took place between Court and counsel which is set forth verbatim:

> "MR. MOSES: I want to make our position perfectly clear. If the Court is going to make a ruling, as I understand it, that you

> are compelling, you are ordering Mrs. Hess to submit to and to communicate with the experts for the State of Montana for the purpose of having available at trial the testimony of these experts at the time of trial, that she is compelled to do that? Now, I understand that is in essence what the Court has ordered.
>
> "THE COURT: Well, I am granting the motion, so that's the end result." [Tr. p. 111.]

With respect to the issues presented in this case, the following facts appear without contradiction:

Dr. Stratford conceded that a mental disease or defect was not involved in this case. [Tr. p. 196.] He further conceded that he was not taking into account what rights she had. There was no advice of rights, and counsel was not permitted to be present, and the testimony of the two expert witnesses for the State was obtained for the use at trial. Both experts for the State testified as to their examination of the defendant, Clara M. Hess. They were permitted to be in the courtroom and to listen to the testimony. (All other witnesses were excluded.)

REASONS FOR GRANTING THE PETITION

I. Right Against Self-Incrimination.

In this case. Clara M. Hess, through her counsel of record, objected to and raised her constitutional right against self-incrimination. No notice of mental disease or

defect as required by State law was given. Notice of self-defense was provided.

A clear statement of the rule is set forth in *United States v. Perez-Franco*, 873 F.2d 455 (1st Cir. 1989). There, in summary, the Court said:

> ". . . As was summed up in *Cunningham*, 431 U.S. at 806, 97 S.Ct. at 2136, the cases 'settle that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized.' "

See *United States v. Frierson*, 945 F.2d 650 (3rd Cir. 1991).

The following cases should place into proper perspective rules with respect to the protection of the Fifth Amendment.

In *Bellis v. United States*, 417 U.S. 85, 40 L.Ed.2d 678, 94 S.Ct. 2179, the Court said:

> "It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony. In Boyd v. United States, 116 US 616, 29 L.Ed. 749, 6 S.Ct. 538 (1886), we held that 'any forcible and compulsory extortion of a man's own

> testimony or of his private papers to be used as evidence to convict him of crime' would violate the Fifth Amendment privilege. Id., at 630, 29 L.Ed.2d 746; see also id., at 633-635, 29 L.Ed. 746; Wilson v. United States, 221 US 361, 377, 55 L.Ed. 771, 31 S.Ct. 538 (1911)."

In *Fisher v. United States*, 425 U.S. 391, 48 L.Ed.2d 39, 96 S.Ct. 1569, the Court said:

> "If the Fifth Amendment protected generally against the obtaining of private information from a man's mouth or pen or house, its protections would presumably not be lifted by probable cause and a warrant or by immunity. The privacy invasion is not mitigated by immunity; and the Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness." (Emphasis supplied.)

We are reminded that it is not the Chancellor's foot or "weighing the equities" that determines the application of the Fifth Amendment, and the above case makes this very clear.

See *Malloy v. Hogan*, 378 U.S. 1, 12 L.Ed.2d 653, 84 S.Ct. 1489, and *Murphy v. Waterfront Commission of New York*, 378 U.S. 51, 12 L.Ed.2d 678, 84 S.Ct. 1594.

In *Escobedo v. Illinois*, 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758, the Court held as follows:

> " `[A]ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby'. (Emphasis in original.)"

See also *Berkemer v. McCarty*, 468 U.S. 420, 82 L.Ed.2d 317, 104 S.Ct. 3138.

See *Estelle v. Smith*, 451 U.S. 454, 68 L.Ed.2d 359, 101 S.Ct. 1866.

In *Buchanan v. Kentucky*, 483 U.S. 402, 97 L.Ed.2d 336, 107 S.Ct. 2906, the Court said:

> "Moreover, Smith's counsel neither had placed at issue Smith's competency to stand trial nor had offered an insanity defense. See id., at 457, and n 1, 458, 68 L.Ed.2d 359, 101 S.Ct. 1866.

See *Garrity v. New Jersey*, 385 U.S. 493, 17 L.Ed.2d 562, 87 S.Ct. 616, where the Court said:

> "`Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary . . . .' Id., at 70, 63 L.Ed. at 133.
>
> "Where the choice is `between the rock and the whirlpool,' duress is inherent in deciding

to 'waive' one or the other.

* * *

> "In that case appellant paid under protest. In these cases also, though petitioners succumbed to compulsion, they preserved their objections, raising them at the earliest possible point. Cf. Abie State Bank v. Bryan, 282 US 765, 776, 75 L.Ed. 690, 703, 51 S.Ct. 252. The cases are therefore quite different from the situation where one who is anxious to make a clean breast of the whole affair volunteers the information."

See also *Spevack v. Klein*, 385 U.S. 511, 17 L.Ed.2d 574, 87 S.Ct. 625. Further approval of *Garrity v. New Jersey*, is *United States v. White*, 887 F.2d 2267 (D.C. Cir. 1989).

In this case, the Court ruled that Clara Hess could not produce an expert to testify as to "the Battered Woman Syndrome" unless she submitted to a psychological and psychiatric examination by the State. The significance of this case is that to be able to assert the Battered Woman Syndrome by expert testimony you are required to give up your right against self-incrimination. That, in our judgment, is wrong.

II. Advice of Rights.

During the course of the trial and the proceedings had and taken in this case, counsel has repeatedly and continuously raised the issue presented in *Estelle v. Smith*,

supra, which flatly states that if a defendant is subjected to a psychiatric or other mental examination he (or she) must be given their constitutional rights prior to any testimonial examination. The Court said:

> " 'Volunteered statements. . . are not barred by the Fifth Amendment,' but under Miranda v. Arizona, supra, we must conclude that, when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to Dr. Grigson were not 'given freely and voluntarily without any compelling influences' and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them. Id., at 478, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 Ohio Misc 9, 36 Ohio Ops 2d 237, 10 ALR3d 974. These safeguards of the Fifth Amendment privilege were not afforded respondent and, thus, his death sentence cannot stand.

This has application in the case at bar.

III. Right to Counsel.

Again, reference must be made to *Estelle v. Smith*, *supra*, as setting forth the right to counsel. There, the Court said:

> "The Sixth Amendment, made applicable to the states through the Fourteenth Amendment, provides that '[i]n all criminal prosecutions,

the accused shall enjoy the right . . . to have the assistance of counsel for his defence.' The 'vital' need for a lawyer's advice and aid during the pretrial phase was recognized by the Court nearly 50 years ago in Powell v. Alabama, 287 US, 45, 57, 71, 77 L.Ed. 158, 53 S.Ct. 55, 84 ALR 527 (1932). Since then, we have held that the right to counsel granted by the Sixth Amendment means that a person is entitled to the help of a lawyer 'at or after the time that adversary judicial proceedings have been initiated against him . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' Kirby v. Illinois, 406 U.S. 682, 688=689, 32 L.Ed.2d 411, 92 S.Ct. 1877 (1972) (plurality opinion); Moore v. Illinois, 434 U.S. 220, 226-229, 54 L.Ed.2d 424, 98 S.Ct. 458 (1977). And in United States v. Wade, 388 U.S. at 226-227, 18 L.Ed.2d 1149, 87 S.Ct. 1926, the Court explained:

" 'it is central to [the Sixth Amendment] principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.' (Footnote omitted.)

"See United States v. Henry, 447 U.S. 264, 65 L.Ed.2d 115, 100 S.Ct. 2183 (1980); Massiah v. United States, 377 U.S. 201, 12

L.Ed.2d 246, 84 S.Ct. 1199 (1964). See also White v. Maryland, 373 U.S. 59, 10 L.Ed.2d 193, 83 S.Ct. 1050 (1963); Hamilton v. Alabama, 368 U.S. 52, 7 L.Ed.2d 114, 82 S.Ct. 157 (1961)."

In this case, counsel was not permitted to be present at every stage of the proceedings. The significance in this case is that the client cannot anticipate or understand when she needs an attorney. The attorney must be psychic to anticipate the testimony that might be used against her. In this case, Dr. Stratford, the State's psychiatrist, testified by demeaning Clara Hess. Of equal importance is the fact that in the absence of an attorney, she was not given her constitutional rights. The State asserts that she must have known her constitutional rights at that time, since she had an attorney. We respectfully submit this is wrong.

IV. The Court erroneously failed to consider the application of State law.

The appellate court, in its decision, took the view that matters of interpretation of State law are matters of concern for State judicial proceedings. We respectfully submit this is erronous under the facts and circumstances of this case.

In *Knapp v. Cardwell*, 667 F.2d 1252 (9th Cir. 1982), the appellate court held that the construction of a state statute must be treated as if it had been incorporated into the words of the statute and the state courts have the final authority to interpret state legislation. That part of the law is clear. The Court went on, however, to point out that federal courts will not review a state Supreme

Court interpretation of its own statute unless that interpretation is clearly untenable . . . (as a deprivation of rights guaranteed by the Constitution).

This case is supported by *Oxborrow v. Eikenberry*, 877 F.2d 1395 (9th Cir. 1989).

McSherry v. Block, 880 F.2d 1049 (9th Cir. 1989). In that case, the Court held [citing cases] that "our task is only to decide whether the state court's interpretation of its own law is so unexpected, so outlandish that no reasonable person could ever have expected it" [citing *Bouie v. Columbia*]. "We must decide only whether the construction actually given the statute was foreseeable." Due process and ex post facto laws are likewise affected as constitutional violations.

In *Devine v. New Mexico Department of Corrections*, 866 F.2d 339 (10th Cir. 1989), the question of foreseeability was answered in this fashion:

> "The court has stated only that a decision is unforeseeable if it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." [Citing *Bouie v. Columbia*.]

In *Bouie v. Columbia*, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697, the Supreme Court had occasion to consider the "drug store sit-in" and the application of the trespass law in the State of South Carolina. The Supreme Court of South Carolina had ruled that the new version of the trespass law was constitutional, and the Supreme Court of the United States reversed. In that case, the Court held

there was a violation of due process that may be accomplished by a state judiciary in the course of construing an otherwise valid state statute. It not only is a violation of due process, but is a violation of the ex post facto law as it applies not only to legislative action, but to judicial decisions as well. That case was not considered on the appeal and is applicable to Mrs. Hess. What has happened in this case is that the Supreme Court of Montana and the Federal District Court have taken insanity statutes and simply expanded their meaning and the concept to apply to self-defense in this case. As previously indicated to the Court, the prosecution is bound to prove act and mental state beyond a reasonable doubt. *Sandstrom v. Montana*, 442 U.S. 510, 61 L.Ed.2d 39, 99 S.Ct. 2450, seemingly set this issue at rest, requiring the State to prove its case beyond a reasonable doubt and not requiring the defendant to come forth with some burden to defeat the charges in that case.

What has happened in this case is that the appellate courts have expanded the meaning and concept of the plain law to assert that the "Battered Woman Syndrome" is "akin" to mental disease or defect and justifies a mental examination by experts for ths State. This simply expands the meaning and concept of State law to levels that could not be anticipated. It is clear that the Battered Woman Syndrome has never been included or considered by the DSM-III-R or the DSM-IV as a mental disease or defect. To suggest it is akin to a mental disease or defect and covered by the insanity statutes is to expand, without justification, the law in that respect.

Obviously, if you provide notice that you "may call" an expert to testify as to the Battered Woman Syndrome,

that, as a result of that notice, the defendant must submit to mental examination. In essence, this violates the right against self-incrimination by unanticipated and clearly unforeseeable construction of the laws of the State of Montana.

It is our belief that the decision of the Courts to use the Battered Woman Syndrome as a mental disease or defect is without foundation, either in the law or in medicine. It is adding a new interpretation of the law which was never foreseeable and contrary to the rules of statutory construction as set forth in the following cases: *TVA v. Hill*, 437 U.S. 153, 57 L.Ed.2d 117, 98 S.Ct. 1279; *United States v. Albertini*, 472 U.S. 675, 86 L.Ed.2d 536, 105 S.Ct. 289, where the Court said:

> "Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. [Citing cases.]"

United States v. Monsanto, 491 U.S. 600, 105 L.Ed.2d 512, 109 S.Ct. 2657. In that case, the effort was made to exempt attorneys' fees on forfeiture proceedings, and the Court clearly held that you cannot add to the plain language of the statute. In *Heckler v. Mathews*, 465 U.S. 728, 79 L.Ed.2d 646, 104 S.Ct. 1387, the Court said as follows:

> "Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of the statute or judicially righting it.

[Citing cases.]"

See also *Freytag v. Commissioner*, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991), where the Court held that where the terms of the statute are unambiguous, judicial inquiry should be complete except in rare and exceptional circumstances. We can likewise quote *In re Bonner Mall Partnership*, 2 F.3d 899 (9th Cir. 1993). There the Court held that the interpretation of the statutory provision must begin with the plain meaning of its language and where the statutory language is unambiguous, the judicial inquiry is complete, citing *Pennsylvania Public Welfare Department v. Davenport*, 495 U.S. 552, 110 S.Ct. 2126, 109 L.Ed.2d 588; *Connecticut National Bank v. Germain*, ___ U.S. ___, 112 S.Ct. 1146, 117 L.Ed.2d 391.

As a final comment, it is to consider this case from a defense lawyer's perspective. Can he advise the client that she has the full protection of the Fifth Amendment? Can he advise the client that the statutes do not authorize a psychiatric or psychological examination in this case? Can he advise the client that she need not give up one constitutional right as a sanction for the sake of exercising another constitutional right? Can an attorney advise the client that self-defense is based upon fear and is not under any circumstances a mental disease or defect, and those statutes are simply inapplicable because they don't apply to her case? And, can a lawyer properly advise a client that if she may use a witness in her defense case that she must be required to submit to a mental examination, and that such mental examination raises not only an issue not required to be proven by the State beyond a reasonable doubt, but places a burden upon her to produce testimony in her own behalf, contrary to Supreme Court decisions?

Is the attorney bound to anticipate that the Courts will change the law and not consider the state statutes that are applicable or give them a new face that could not be anticipated? This seems a terrible burden to bear.

CONCLUSION

For the reasons stated and the authorities cited, the petitioner, Clara M. Hess, prays that this Honorable Court grant his Petition for a Writ of Certiorari.

DATED this 21st day of February, 1996.

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